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HOME MARKET CLUB, BOSTON.

THE INCOME TAX QUESTION.

The Income Tax Question

(SECOND PAMPHLET)

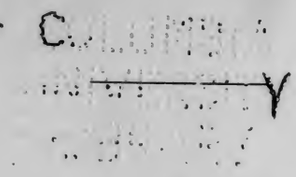
Objections to a Federal Income Tax by Senator Hill of New York

Arguments of Richard Olney for the Tax and of Joseph H. Choate Against It.

Decision of the Supreme Court in 1895, Holding the Income Tax Sections of the Wilson Law Unconstitutional.

Opinions of the Justices For and Against.

Applicability to the Pending Amendment.



1909-1910
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CONTENTS.

Arguments and Opinions in the Latest Federal Income Tax Case.

In an earlier pamphlet on this subject, the elaborate brief of Mr. Southmayd of New York, in the Pollock case, shows the arrangement between the States and the United States, fixed in the Constitution, by which customs and excises are given to the general government and taxes on property are given to the several states, and for emergencies the privilege of taxing property or incomes is given to the federal government under the condition that the tax shall be apportioned among the states according to their population, so that no new section of the country, where incomes may be small enough to escape taxation, can have the power to throw the burden wholly upon the older and wealthier sections.

That pamphlet also contains a very informing article on the British income tax, by Sir Guilford L. Molesworth, in which the opinions of many other British statesmen and economists are cited, all showing how much the tax is disliked and how badly it is misused in that country.

The pamphlet now in hand presents:

(1) The concise summary of objections to a federal income tax presented in the United States Senate, June 28, 1894, by Senator David B. Hill (Dem.) of New York.

(2) The argument for the tax, in the Pollock case arising under that law, by Attorney General Richard Olney of Boston, and the argument against the tax, by the Honorable Joseph H. Choate of New York.

(3) Summaries of the opinions, majority and minority, of the Justices of the Supreme Court.

Some portions of these arguments and opinions are devoted to showing why that tax was or was not constitutional and so do not directly apply to the pending proposition to change the Constitution; but other portions bear upon it, because they show the taxation adjustment made between the States and the Federal Government, the reasons for which still subsist.

This pamphlet, therefore, makes a fair and non-partisan presentation of the question by the most eminent jurists in the country and is very helpful to those who desire to reach correct conclusions on the pending amendment.

DAVID B. HILL'S OBJECTIONS.

In the Senate committee of the whole, June 28, 1894, the income tax was agreed to as a part of the tariff bill. Senator Hill of New York (Dem.) filed the following objections to it:

First—An income tax has no legitimate place in a tariff reform bill. The effort to retain it in this bill has hindered, delayed and sacrificed the cause of tariff reform.

Second—An income tax is neither a Democratic nor a Republican principle, and has never been approved by the people at the polls, but is one of the doctrines of the Populist party.

Third—It is an unnecessary tax. The

needs of the treasury will not require the proceeds of this tax, but sufficient revenues will be realized under the other provisions of the measure.

Fourth—It is a direct tax within the meaning of the Constitution, and, not being laid in proportion to population, is unconstitutional and cannot be enforced.

Fifth—It is unequal, unjust and sectional in its design and operation, and is principally urged by the representatives of those States which will be least affected by its provisions. It is an attack upon the thrift, the energy and the enterprise of the North.

Sixth—It is the revival of an odious tax in a time of profound peace.

Seventh—The exemption of all incomes not exceeding $4,000 is an exemption unprecedented in the history of income tax legislation and stamps the measure as the most offensive species of class legislation. Either substantially all incomes should be taxed or none at all.

Eighth—It is unjust in its discriminations. It exempts the income from $635,000,000 of Government bonds, but denies the same exemption to State bonds. It exempts $4,000 from the individual income of a citizen derived from his general business, but denies him the same exemption if his income is derived from a corporate investment.

Ninth—It is retroactive in its operation. It compels the payment of a tax upon incomes realized since Jan. 1, 1894.

Tenth—It usurps those fields of revenue which belong to the States. This measure not only provides for income taxation proper, but also includes an inheritance and gift tax, thereby trespassing upon a field already occupied by many States. Incomes, if taxed at all, should be taxed by State rather than Federal authority.

Eleventh—Its provisions are inquisitorial and offensive in their character. The political agents of the Government are vested with vast powers, which are liable to abuse. It is a system of taxation unsuited for a free government.

Twelfth—It violates the Constitution, because it usurps those revenues derived from certain domestic corporations which the States have themselves created, and the revenues of which corporations the States have set apart for the uses of their own State Governments. The proposed tax is an attack upon the sovereignty of the States.

Thirteenth—The absorption of these legitimate State revenues by the General Government will necessarily lead to increased direct taxation by the States and add to the existing burden of the people.

Fourteenth—The tax proposed is double that recommended by Secretary Carlisle.

Fifteenth—It will duplicate taxation, create friction and promote conflict or contention between the General Government and the States, is contrary to the established policy of the Government, is a step toward Socialism and is unwise from every point of political expediency.

Senator Manderson (Rep.) of Nebraska, moved the following additional objection, which Mr. Hill accepted:

It creates a class to pay a part of the expenses of the Government, and is the first step toward the creation of a privileged few constituting a moneyed aristocracy, which, contributing from their abundant revenues or incomes to the support of the Government, will rule it.

Mr. Hill's motion to strike out the income tax sections was defeated, yeas 23, nays 40. Three Democrats, Hill of New York, and Smith and McPherson of New Jersey were against the tax. Three Populists and six Republicans, all from the far West, voted with the Democrats, most of whom were from the West and South, for the tax.

THE ARGUMENTS.

There was a large array of eminent lawyers on both sides at the hearing before the Supreme Court, in March, 1895—those against the tax being Joseph H. Choate, Clarence A. Seward, Benjamin H. Bristow, W. D. Guthrie, David Wilcox, Charles Steele and George F. Edmunds, and those for the tax being Attorney General Olney, his assistant, Mr. E. B. Whitney, and Mr. James C. Carter of New York.

In order that the arguments may be better understood, it is well to refer to the provisions of the Constitution which bear upon the case. They are:

Art. 1, Sec. 2, Paragraph 2:—"Representatives and direct taxes shall be apportioned among the several states which may be included within this Union according to their respective numbers"—that is, the numbers of the people.

Art. 1, Sec. 8:—"The Congress shall have power to lay and collect taxes, duties, imposts and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States."

Fifth Amendment, latter part: "Nor [shall any person] be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Most of the counsel closely followed the line of the law, but Mr. Carter gave a thought to what he considered public opinion and said that "a triumphant majority" will have way, "if need be, over the ruins of Constitutions and of courts." Something of this feeling undoubtedly exists today. Nevertheless it is safe to assume that the people do not wish to revolutionize the government unless convinced that methods and agreements which were necessary to its formation and which have worked well for one hundred and twenty years can be improved for the future.

ARGUMENT OF ATTORNEY-GENERAL OLNEY FOR THE LAW.

Mr. Olney devoted his argument on the part of the United States to the constitutional questions which the several plaintiffs alleged to be involved in the cases presented.

Many of the objections raised seemed to him to be simply perfunctory—taken pro forma and by way of precaution.

No time, he thought, need be expended in discussing the averments that the income tax law was an invasion of vested rights and took property without due process of law.

These propositions were generalities, and, if there was anything in them, it was because they comprehended others, which were the only real subjects of profitable discussion.

Suppose it to be true that the income tax law undertook to ascertain the incomes of citizens by methods which were not only disagreeable, but were infringements of personal rights. The consequence would be not that the law was void, but that the hotly denounced inquisitorial methods could not be resorted to.

Similar considerations would apply to the objection that the law was to be pronounced void because taxing the agencies and instrumentalities of the governments of the several states.

It had not yet been definitely adjudicated, and it was by no means to be admitted, that the income of state and municipal securities was not taxable by the United States when assessed as a part of the total income of the owners under a law assessing income generally, and not discriminating between such securities and others of the like character.

But, suppose the contrary, the result would be not to find that the law was bad in toto, but that it was bad only

as to the income from state and municipal securities.

If I am right in these observations the constitutional contention of the plaintiffs simmers down to two points:

One is that an income tax is a direct tax, and must be imposed according to the rule of apportionment, and the other is based upon the alleged violation of the constitution with regard to uniformity. I do not stop to discuss the question what the constitutional rule of apportionment is.

I do not think I ought to delay the court for any considerable time with the question whether an income tax is direct or indirect. Whether an income tax is what the constitution describes as a "direct tax" is a question as completely concluded by repeated adjudications as any question can be. It is a direct tax within the meaning of the constitution, unless five concurring judgments of this court have all been erroneous.

The attorney-general denied that any land tax was aimed at or attempted by the statute—there was no lien on land for payment. The whole scope and tenor of the statute showed the contemplated subject of taxation to be personal property and nothing else.

Discussing the meaning of the word "uniform" as applied to the collection of imposts, excises, etc., he declared that the word had a territorial application and no other. "A federal tax," he said, "which is not a poll tax nor a tax on land, must be the same in all parts of the country. It cannot be one thing in Maine and another thing in Florida. The law providing for such a tax must be like a bankruptcy law or a naturalization law. It must have the same operation everywhere, wholly irrespective of state lines."

The power to tax was for practical use, and was necessary to be adapted to the practical conditions of human life. These were never the same for any two persons, and as applied to any community, however small, were infinitely diversified. Nothing was more evident or had been oftener declared by courts and jurists than that absolute equality of taxation was impossible. No system had been or could be devised that would produce any such result. No country or state of this Union had ever adopted a plan of taxation that did not exempt some portions of the community from a burden that was imposed upon others. The power to do so was unquestioned, and was universally exercised.

It was quite beside the issue to argue in this or any other case that Congress had mistaken what public policy required. On that point Congress was the sole and final authority, and its decision, once made, controlled every other department of the Government.

No exemption was made by the statute in favor of a class that was not based on some obvious line of public policy—and, that class being established, one uniform rule was applicable to its members.

It is manifest that in this distinction between people with incomes over $4,000 and those with incomes under that amount Congress was proceeding upon definite views of public policy, and was aiming at accomplishing a great public object. It was seeking to adjust the load of taxation to the shoulders of the community in the manner that would make it most easily borne and most lightly felt.

So with business corporations. Their net incomes were taxed at the standard rate of two per cent., but undiminished by the standard deduction of $4,000. The result might be that a man in business as a member of a corporation was taxable at a little higher rate than a man in the same business by himself or as copartner.

It was common knowledge that corporations are so successful an agency for the conduct of business and the accumulation of wealth that a large section of the community viewed them with intense disfavor. When, therefore, this income tax law made a special class of business corporations, and taxed their incomes at a higher rate than that which applied to the incomes of persons not incorporated, it but recognized existing social facts and conditions which it would be folly to ignore.

In conclusion, Mr. Olney said: "It would certainly be a mistake to infer that this great array of counsel, this elaborate argumentation and these numerous and voluminous treatises, miscalled by the name of briefs, have any tendency to indicate anything extraordinary or unique either in the facts before the court or in the rules of law which are applicable to them. I venture to suggest that all this laborious and erudite and formidable demonstration is bound to be without effect on one distinct ground. In its essence and in its last analysis it is nothing but a call upon the judicial department of the government to supplant the political in the exercise of the taxing power; to substitute its discretion for that of Congress in respect of the subjects of taxation, the plan of taxation, and all the distinctions and discriminations by which taxation is sought to be equitably adjusted to the resources and capacities of those who have it to bear. Such an effect, however weightily supported, can, I believe, have but one result. It is inevitably predestined to failure, unless this court, for the first time in its history, overlook and overstep the limits which separate the judicial from the legislative power, and the scrupulous observance of which is absolutely essential to the integrity of our constitutional system."

ARGUMENT OF MR. CHOATE AGAINST THE TAX.

Hon. Joseph H. Choate of New York said: "It never would have occurred to me to present either an opening or a closing argument to this great and learned court that if, in their wisdom, they found it necessary to protect a suitor who sought here to invoke the protection of the constitution which was created for us all, possibly the popular wrath might sweep the court away. It is the first time I ever heard that argument presented to this court or any other, and I trust it will be the last.

"I thought until today that there was a constitution of the United States, and that the business of the executive arm was to uphold the constitution. I thought that this court was created for the purpose of maintaining the constitution as against unlawful conduct on the part of Congress. It is news to me that Congress is the sole judge of the measure of the powers confided to it by the constitution, and it is also news to me that that great fundamental principle that underlies the constitution, namely, the equality of all men before the law, has ceased to exist."

Mr. Choate said that on the day of Gen. Sherman's funeral ex-President Hayes said to him that he (Choate) would probably live to see the day when in the case of the death of any man of large wealth the state would take for itself all above a prescribed limit of his fortune, and divide it or apply it to the equal use of all the people. He (Choate) had looked upon that remark as the wanderings of a dreamer, and yet in less than five years he found himself in the supreme court of the United States contesting the validity of an alleged act of Congress, which was defended by the authorized legal representative of the government, upon the plea that it was only a tax levied upon extremely rich men. It was defended upon principles as communistic, socialistic, populistic, as has ever been addressed to any political assembly in the world.

Mr. Carter, continued Mr. Choate, had said that in the convention which framed the constitution there was one ever present fear. This was that by a combination of states an unjust tax might be put upon a single state or a little group of states. Mr. Choate directed the attention of the court as to how the present law would strike. In 1873, Massachusetts, New York, New Jersey and Pennsylvania paid four-fifths of the tax on incomes above $2,000. What was their political representation in the House of Representatives, which only can initiate the passage of revenue bills? Eighty-three out of 356, or a little less than one-fourth. The increase of exemption from $2,000 to $4,000 would bear upon those states with vastly greater force, so that they would pay nineteen-twentieths of the tax under a law "imposed upon them by other states who, as the chief justice has quickly seen in the course of the argument, will not bear a dollar of it.

This iniquitous result, Mr. Choate said, had been brought about by an express violation of two of the leading prohibitive restraints of the constitution,

and, despite the contention of the attorney-general and his associates that the state of things could not be helped, Mr. Choate thought it could. The main argument presented by Mr. Carter in support of the law was that the men upon whom it was imposed were too rich. He claimed that $20,000 might have been made the minimum of exemption in the law and that there would have been no help for it. He said in his brief, that, although we could not tax John Jones by name, however rich he might be, we could make a class to designate him and so tax him.

Now, continued Mr. Choate, if you approve this law, with this iniquitous exemption of $4,000, and this communistic march goes on, and five years hence they come to you with an exemption of $20,000 and a tax of 20 per cent., how can you meet it, in view of the decision they ask you to render? There is protection now or never under this law. My learned friend says you cannot apply any limit. He says that no matter what Congress does in the matter of a limit, if in their views of so-called—what did he call it?—sciology? political economy?—they fix a limit of a minimum of $20,000 or a minimum of $100,000, this court will have nothing to say about it. I agree that it will have nothing to say if it lets go its hold upon this law—upon a law passed for such a purpose, accomplishing such a result by such means.

I thought that the fundamental object of all civilized government was the preservation of the right of private property. That is what Mr. Webster said at Plymouth Rock in 1820, and I supposed that all educated, civilized men believed it. According to the doctrines that have been propounded here this morning, even that great fundamental principle has been scattered to the wind.

Washington and Franklin were alive to that sacred principle, and if they could have foreseen that in a short time—for what were 115 years in the life of the republic?—it would be claimed in the supreme court of the United States that, not despite that constitution, but by means of it, they had helped create a combination of states that could pass a law for breaking into the strong boxes of the citizens of other states, and giving out the wealth of everybody worth more than $100,000 for general distribution throughout the country, they would both have been keen to erase their signatures from an instrument that would result in such consequences. The spirit that invaded the halls of Congress was seeking to throw up its entrenchments in the supreme court of the United States. If this law were upheld, the first parallel would be carried, and then it would be easy to overcome the whole fortress on which the rights of the people depended.

Mr. Choate conceded that Congress had plenary power to tax, and that it was necessary, in order to maintain his position, for him to show either that Congress had not the power to pass the sections of the act complained of, or that, in passing them, it had transgressed the measure of the exercise of that power entrusted to it.

He called attention to the distribution of the power of taxation and the limitations of the exercise of that power, from the operation of which it could not, by any device, escape.

Mr. Choate said he did not impute to the constitutional convention such heedlessness or ignorance as was suggested in one of the briefs on the other side; that he did not believe or understand that it covered the whole subject of taxation, by its declarations with respect of direct taxes, imposts, excises and duties.

How about the corpus of personal property? If a tax upon it was neither a direct tax, nor an impost or excise or a duty, what would follow? Just that which Chief Justice Chase said many years ago would apply—that it was a tax to be enforced by Congress, and laid neither according to apportionment nor of equality and uniformity. And yet in all that 100 years nobody had even suggested that such a tax could be so enforced and collected.

The true rule of construction was to impute to the work of the constitutional convention the same interpretation that everybody else gave to it at the time, and had ever since given it. Mr. Wadleigh of New Hampshire had the true

idea when he said, discussing the operation of the taxing clause, that it would bear hardly upon his state, but that New Hampshire would consent to it in order to have the constitution adopted. Why should it bear hardly upon New Hampshire, with its mountains and rocky hillsides, were it not that all taxes, except duties, imposts and excises, should be apportioned according to the population?

Mr. Choate asserted that the tax upon real estate, the rents and incomes therefrom, was a direct tax, and that the members of the constitutional convention had them in mind as a subject of direct tax when they used that term. He took that, he said, not from anything that had been said by Justice Patterson or anybody else in an effort to limit or prescribe the meaning of the constitution, but from the generally and universally acknowledged consent of mankind, then and now. There had been three periods of direct taxation—in 1792, when trouble with France was apprehended; during the war of 1812, and in the war of the rebellion. The first was emblematic of them all—it was a direct tax upon real estate, not naked land, as Mr. Carter had contended, but upon houses and lands, productive and unproductive alike.

The second proposition which Mr. Choate advanced was that a tax upon rents from real estate was indistinguishable from a tax on the real property itself. He had understood the learned attorney-general to say no; that the rent, after it got into a man's pocket, was money, and that it was that which was taxed. The law proposed to tax rents as personal property and not as real estate. But how could anyone pay the tax upon land? He put the question, he said, as applied to the practical, ordinary business affairs of life, of which the court was bound to take knowledge—except as he paid it from the rentals? The owner could not take a piece of the land and give it to the government as an equivalent for the tax. Is there any difference, then, between a tax on land and a tax on the rents therefrom? An unapportioned tax upon real estate the constitution forbade; could such a tax be laid upon the rents or income thereof? No one would say that such a law could be maintained. A tax upon land being forbidden, Congress could not wipe out the value of the land by a tax upon the income therefrom for a period of years. We have been lawyers all our lives and have followed scores of generations in considering the difference between land and the rent or profit thereon. We have found it to be an intangible and insensible thing.

Illustrating this, he quoted Coke upon Littleton, which, he said, had been the law in all English christendom ever since, that when a land owner grants the profits of his lands to another, the fee to the land itself passes, for what is land but the profit thereon?

The attorney-general had said that the law taxed rents as personal property and not as rents. If that were so, it would still need to be apportioned among the states according to population, to be effective; but the law assessed a tax on rents as such, and not as personal property. He quoted numerous decisions by the Supreme Court of the United States itself that a tax upon the profits arising from a certain business or thing was a tax upon the business or thing itself. Therefore, he submitted the proposition, although with diffidence, because it had been so stoutly contested by his learned adversaries, that a tax upon rents is a tax upon land, and required, by the same law and the same constitution, to be apportioned among the states, according to population, to be effective. And so as to personal property, a tax upon it was included within the term of direct taxes and valid only when apportioned among the states.

Suppose a man, assessed on his personal property, under a tax apportioned among the states, should refuse to pay on the ground that it was an excise tax, a duty, and appealed to the courts for relief. Would any court grant it? Not at all. The tax on interest of United States bonds was a tax on the bond itself, as in the case of rents, and, therefore, could not be legally collected. The interest on the bond issued by the United States or any other body politic, was a part of the bond itself, and insep-

arable from it. What value to me is a bond of the United States, payable 30 years hence, but for the fact that, in the meantime, it promises to pay me interest semi-annually at the rate of three per cent.?

Concluding this part of the argument, Mr. Choate insisted that he had established beyond controversy the proposition that a tax on rents is a tax on land, and, therefore, a direct tax. The other side had our briefs two weeks, and the only answer or suggestion they have been able to make is that of the attorney-general, that the law taxes rents as money in a man's pocket and not as rents.

Mr. Choate sketched in a most interesting and instructive way the compromise made in the constitutional convention relating to the matter of taxation, by which the states surrendered to the United States the sole right to levy excises, duties and imposts and to control and regulate commerce between the states, and the right to levy a direct tax upon the real and personal property in the states as an ultimate source of revenue for the maintenance of the government itself. It was by that bargain that the adoption of the constitution was brought about, and the question now was, said Mr. Choate, whether the bargain should be repudiated and the seaboard states should take back the price paid for it.

Representation and direct taxation went hand in hand. It was the only thing that the framers of the constitution said twice in that instrument. What was the reason? It was that those men were fresh from the conflict over the injustice of taxation without representation, and they proposed to prevent, as far as they could, the possibility of such an event as is proposed in the present law, that the representatives of a large proportion of the population should vote to compel the smaller proportion of population to pay more than their just part of the taxes.

Mr. Choate asserted that the question that rents are inseparable from real estate, had never been decided by the court; it had never been considered nor even presented for consideration.

In the Springer case, said Mr. Choate, Mr. Springer sued for the recovery of a year's income tax, when he was a representative of the outside world, not a representative in Congress as he has been since, and he averred that he had earned $50,000 that year. He was a lawyer, and advocated his own cause. Probably he was an exception to the rule which usually obtains in those cases.

There was nothing in the pleadings in that case nor in the decision, said Mr. Choate, which precluded an affirmance of the proposition for which he contended.

Mr. Choate then proceeded to give the court, at considerable length, his definition of the "uniform" clause in the constitution. Mr. Carter, he said, had explained that it meant that the tax should extend throughout the United States, and related to the plan and method of collecting the tax.

Counsel felt constrained to concede something to the phrase, but the attorney-general, in himself representing the august power of the legal branch of the government, used the sponge, and sweeping his arm across the face of the instrument, calmly expunged the words as "mere surplusage."

The meaning of the word, Mr. Choate said, was that in the levying of imposts, duties and excises, whenever done, there should be equal and exact relations between the government and each and every citizen throughout the United States. The rule was introduced to put an end to the previously existing rule of inequality. This construction of the phrase, said Mr. Choate, had been uniformly acted upon by the government ever since its beginning. "I call your honor's attention," he said, "to the fact that there was never a tariff act passed by the United States which made the rate of duty depend upon the person or corporation which paid it."

Justice White—Mr. Choate, would not that construction destroy all specific duties provided in every tariff act?

Mr. Choate—We do not claim such a right. We do not say that every like article shall pay the same rate of duty, or that every special class shall pay the same rate of duty, or that every article of a special class shall pay the same rate.

Justice White—Do not all the decisions of state courts upon the term "equal and uniform" establish the fact that you cannot tax a man with one dollar's worth of property at the same rate you do with $10?

Mr. Choate—I think not.

Not a single decision had been found in either the federal or state books, Mr. Choate said, that varied from the meaning of the word contended for by himself and associate counsel—that the taxes shall be equal as between man and man.

This brought him, said Mr. Choate, to the startling and monstrous doctrine propounded by the representatives of the government, that the inequalities or supposed inequalities of a tariff bill could not be compensated for by irregularities in another form of taxation.

"Is this court ready to go to that length?" he asked. Before leaving this branch of the case, Mr. Choate said there was an unvarying line of decisions by state courts confirming the proposition contended for by him. And it was illustrated and strengthened by the exception quoted from Louisiana.

Mr. Choate then proceeded to discuss the illegal exceptions made by the bill, the first the chief of which was the exemption of incomes of $4,000 and less. The meaning and import of the law, he asserted, was to punish the rich for being in that condition. Counsel who had preceded him advocated the law for the reason that it affected the rich men only, the extremely rich. I thought there was one law for the rich and for the poor. Oh, we are at the parting of the ways, your honors.

The bill, he declared, was a deliberate strike by those who voted for it at those parts of the United States where money has accumulated. The exemption of $4,000 was the same as other blows at the constitution within the four corners of the document.

No wonder that the President refused to sign the bill; no wonder that neither the President nor the Secretary of the Treasury recommended the adoption of the income tax.

Justice Harlan—Do you concede that any exception may be made?

Mr. Choate—We do not.

While discussing the inequalities of exemption accorded to individuals and to corporations, Justice Brown suggested:

"May it not have been that the exemption of $4,000 to the individual was allowed as a reasonable amount for domestic and household expenditures, while the corporation is not compelled to spend anything for those purposes?"

Mr. Choate—My impression is, your honor, that the law is made alike for the corporation and individual. The discrimination against corporations is but a punishment for their having engaged in that form of business which their states had held out to them as a proper and desirable method.

Mr. Choate condemned the exceptions made in behalf of religious, charitable and educational institutions, mutual insurance companies and savings banks.

The last point presented was that state and municipal bonds were entitled to exemption from the operations of the law, upon the same theory that national bonds were exempt from state taxation.

THE DECISION AND HOW THE JUSTICES STOOD.

On the 8th of April, 1895, all the justices who sat in the case decided that so much of the Wilson law as applied to incomes from state and municipal securities and government bonds was unconstitutional, on the ground that it would be destructive to our complex system of government if either the federal or state governments could tax the securities issued by the other.

By one majority the court decided that so much of the law as taxed incomes derived from real estate and personal property was unconstitutional, on the ground that such levy is a direct tax and should have been apportioned among the several states according to their population.

On the other questions, the chief of which was whether a law exempting $4,000 or any other sum from paying an income tax was uniform taxation within the meaning of the constitution, the justices were evenly divided, therefore a full decision had to await the return of Justice Jackson, who was detained by illness.

On Monday, May 20, Justice Jackson having resumed his duties, the court by one majority decided all parts of the income tax feature of the law unconstitutional.

In the first decision Justice Shiras of Pennsylvania had voted to sustain the tax on incomes from real and personal property. Just before the second decision was rendered he notified his associates that on more mature reflection he had changed his mind and now held that feature unconstitutional. Justice Jackson, however, decided the other way, leaving the court as a whole standing as before with one majority against the law.

Party lines were crossed by both sides, but sectional lines obviously affected the minds of some of the justices in making their interpretations.

Those who voted to sustain the law were Justice Harlan (Rep.) of Kentucky, Justice Brown (Rep.) of Michigan, Justice White (Dem.) of Louisiana, and Justice Jackson (Dem.) of Tennessee—4.

Those voting against the law were Chief Justice Fuller (Dem.) of Illinois, Justice Field (Dem.) of California, Justice Brewer (Rep.) of Kansas, Justice Gray (Rep.) of Massachusetts and Justice Shiras (Rep.) of Pennsylvania—5.

Sectionally the majority was well distributed—one justice being from New England, one from the Middle States, two from the West and one from the Pacific coast—all from the North. The minority was composed of one from the West and three from the South.

Only three of the questions then in dispute have a bearing on the question of ratifying the pending amendment, and they are (1) whether a direct tax on property and income should be apportioned among the states according to their population; (2) whether a tax is uniform if incomes to a certain amount are exempted, and (3) whether incomes from federal or state bonds can be taxed without danger of breaking up the government.

The court having been unanimous on this last point, it may be thought that no congress will lay such a tax, but as the pending amendment does not prohibit it, and will be thought by some to supersede not only the decision but the ground upon which it was founded, it may be claimed by others that the ratification of the amendment cannot be otherwise interpreted than as the granting of perfect liberty to congress and to state legislatures to tax each other's securities and therefore to destroy them in some crisis.

GROUNDS OF THE DECISION, AS STATED BY THE CHIEF JUSTICE.

1. That by the Constitution Federal taxation is divided into two great classes—direct taxes, and (2) duties, imposts and excises.

2. That the imposition of direct taxes is governed by the rule of apportionment among the several States, according to numbers, and the imposition of duties, imposts and excises by the rule of uniformity throughout the United States.

3. That the principle that taxation and representation go together was intended to be and was preserved in the Constitution by the establishment of the rule of apportionment among the several States.

4. That the States surrendered their power to levy imposts and to regulate commerce to the General Government, and gave it the concurrent power to levy direct taxes in reliance on the protection afforded by the rules prescribed, and that the compromises of the Constitution cannot be disturbed by legislative action.

5. That these conclusions result from the text of the Constitution and are supported by the historical evidence furnished by the circumstances surrounding the framing and adoption of that instrument, and the views of those who framed and adopted it.

6. That the understanding and expectation at the time of the adoption of the Constitution was that direct taxes would not be levied by the General Government, except under the pressure of extraordinary exigency, and such has been the practice down to August 15, 1894.

7. That the taxes on real estate belong to the class of direct taxes, and that the taxes on the rent or income of real estate, which is the incident of its ownership, belong to the same class, and that taxes on personal property or on the income of personal property are likewise direct taxes.

8. That by no previous decision of this court has this question been adjudicated to the contrary of the conclusions now announced.

JUSTICE HARLAN'S DISSENTING OPINION.

In my judgment—to say nothing of the disregard of the former adjudications of this court, and of the practice of the government for a century—this decision may well excite the gravest apprehensions. It strikes at the very foundations of national authority, in that it denies to the general government a power which is, or may become at some time, in a great emergency, such as that of war, vital to the existence and preservation of the union. It tends to re-establish that condition of helplessness in which Congress found itself during the period of the articles of confederation, when it was without power, by laws operating directly upon individuals, to lay and collect, through its own agents, taxes sufficient to pay the debts and defray the expenses of government, and was dependent in all such matters upon the good will of the states, and their promptness in meeting the requisitions made upon them by Congress.

Any attempt upon the part of Congress to apportion taxation of incomes among the states upon the basis of their population would, and properly ought to, arouse such indignation among the freemen of America that it would never be repeated.

Under that system the people of a state containing 1,000,000 inhabitants, who receive annually $20,000,000 of income from real and invested personal property, would pay no more than would be exacted from the people of another state having the same number of inhabitants, but who receive an income from the same kind of property of only $5,0000,000. If this new theory of the constitution, as I believe it to be; if this new departure from the way marked out by the fathers is justified by the fundamental law, the American people cannot too soon amend their constitution.

DISSENTING OPINION OF JUSTICE WHITE.

1. The Government of the United States possesses plenary powers of taxation—all powers which belong to any Government as such—subject only to the limitation imposed by the Constitution in forbidding the levying of an export tax.

2. This power, unlimited in itself, is limited as to form by the requirement that direct taxes shall be apportioned according to population, and duties, excises and imposts shall be uniform throughout the United States.

3. The limit as to apportionment is not a limitation on the power of taxation, but a limitation of the manner in which the power shall be exercised.

4. Whether a Federal income tax is direct or indirect does not depend alone upon the theories of economists, but upon the sense in which these words are used in the Constitution, as heretofore interpreted.

5. Shortly after the Constitution was framed (1794) Congress put a construction upon these words by imposing a tax on carriages. The act was passed by a large majority, and was approved by Washington.

After reviewing the cases, beginning with the Hylton case in 1796 and ending with the Springer case in 1880, Justice White claimed that all the decisions of the supreme court relating to the question had held that an income tax is an indirect tax and does not need to be apportioned among the states according to their population.

JUSTICE FIELD IN OPPOSITION TO THE TAX.

Some decisions of this Court have qualified or thrown doubts upon the exact meaning of the words "direct taxes." Thus in Springer agt. United States (102 U. S. 586), it was held that a tax upon gains, profits and income was an excise or duty, and not a direct tax within the meaning of the Constitution, and that its imposition was not therefore unconstitutional. And in Pacific Insurance Company agt. Soule (7 Wall. 433) it was held that an income tax or duty upon the amounts insured, renewed or continued by insurance companies, upon the gross amounts of premiums received by them and upon assessments made by them, and upon dividends and undistributed sums, was not a direct tax, but a duty or excise. In the discussions on the subject of direct taxes in the British Parliament an income tax has been generally designated as a direct tax, differing in that respect from the decision of this court in Springer against the United States; but, whether the latter can be accepted as correct or otherwise, it does not affect the tax upon real property and its rents and income as a direct tax. Such a tax is by universal consent recognized to be a direct tax. As stated, the rents and income of real property are included in the designation of direct taxes as part of the real property. Such has been the law in England for centuries, and in this country from the early settlement of the colonies; and it is strange that any member of the legal profession should at this day question a doctrine which has always been thus accepted by common-law lawyers.

But the law is not invalid merely in its disregard of the rule of apportionment of the direct tax levied. There is another and equally cogent objection to it. In taxing incomes other than rents and profits of real estate it disregards the rule of uniformity which is prescribed in such cases by the Constitution. . . . The taxes created by the law under consideration as applied to savings banks or insurance companies, whether of fire, life or marine, or to buildings or other associations, or to conduct any other kind of business, are excise taxes, and fall within the requirement, so far as they are laid by Congress, that they must be uniform throughout the United States.

The Income Tax law under consideration is marked by discriminating features which affect the whole law. It discriminates between those who receive an income of $4,000 and those who do not. It thus vitiates, in my judgment, by this arbitrary discrimination, the whole legislation.

The present assault upon capital is but the beginning. It will be but the stepping stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness. "If the Court sanctions the power of discriminating taxation, and nullifies the uniformity mandate of the Constitution," as said by one who has been all his life a student of our institutions, "it will mark the hour when the sure decadence of our present Government will commence." If the purely arbitrary limitation of $4,000 in the present law can be sustained, none having less than that amount of property being assessed or taxed for the support of the Government, the limitation of future Congresses may be fixed at a much larger sum, at $5,000 or $10,000 or $20,000, parties possessing that amount alone being bound to bear the burdens of Government; or the limitation may be designated at such an amount as a board of walking delegates may deem necessary. There is no safety in allowing the limitation to be adjusted except in strict compliance with the mandates of the Constitution, which require its taxation to be uniform in operation, and, so far as practicable, in proportion to their property, equal upon all citizens. Unless the rule of the Constitution governs, a majority may fix the limitation at such rate as will not include any of their own number.

JUSTICE JACKSON'S DISSENTING OPINION.

The constitutional provision clearly implied in the requirement of apportionment is that a direct tax is such and such only as can be apportioned without glaring inequality and manifest injustice and unfairness as between those subject to its burden. The most natural and practical case by which to determine what is a direct tax in the sense of the constitution is to ascertain whether the tax can be apportioned among the several states according to their respective number, with reasonable approximation to justice, fairness and equality to all the citizens and inhabitants of the country who may be subject to the operation of the law. The fact that a tax cannot be apportioned without producing gross injustice and inequality among those required to pay it should settle the question that it was not a direct tax within the true sense and meaning of those words as they are used in the constitution.

Let us apply this test. Let us take the illustration suggested in the opinion of the court. Congress lays a tax of $30,000,000 upon the incomes of the country above a certain designated amount and directs that tax to be apportioned among the several states according to their number, and when so apportioned to be prorated among the citizens of the respective states coming within the operation of the law. We take two states of equal population, the citizens in one state having the requisite income subject to the tax, say 5,000 in number, and the citizens of the other state that is of equal population having 10,000 subject to the operation of the law. Now, what is the result of the apportionment of the tax? The citizens in one state will be called upon to pay on their income just twice the amount that the citizens of the other state will pay upon theirs. Take the new state of Washington for example, and the old state of Rhode Island. Washington has, we will say, about 5,000 citizens within its jurisdiction who are subject to the operation of this law; Rhode Island has 50,000. The citizen of Washington, by the rule of apportionment, will be required to pay ten times the rate of taxation on his income which the citizen of Rhode Island pays. Extend this rule as it may be extended, and as I have not the strength to extend it, to all the states, and the result is that the larger the number of those subject to the operation of the law in any given state, the smaller their proportion of the tax and the smaller their rate of taxation, while, in respect to the smaller number in the state, the greater will be their rate of taxation on the same income.

But it is said that this inequality was intentional upon the part of the framers of the constitution, that it was adopted with a view to protect property owners as a class. What an idea! Inequality among its own citizens in this government being intentionally adopted by the framers of the constitution! Why, the very object of its formation was the reverse. The government is not dealing with the states in this matter; it is dealing with its own citizens throughout the country, irrespective of state lines; and to say that the constitution which was intended to promote peace and justice, either in its whole or in any part thereof, ever intended to work out such a result and produce such inequality between the citizens of a common country, is beyond all reason in my judgment.

JUSTICE BROWN'S DISSENTING OPINION.

I regard it as very clear that the clause requiring direct taxes to be apportioned to the population has no ap-

plication to taxes which are not capable of apportionment according to population. It cannot be supposed that the convention could have contemplated a practical inhibition upon the power of Congress to tax in some way all taxable property within the jurisdiction of the federal government, for the purposes of a national revenue. And if the proposed tax were such that in its nature it could not be apportioned according to population, it naturally follows that it could not have been considered a direct tax, within the meaning of the clause in question.

There is, in certain particulars, a want of uniformity in this law, which may have created in the minds of some the impression that it was studiously designed, not only to shift the burden of the taxation upon the wealthy class, but to exempt certain favored corporations from its operation. There is certainly no want of uniformity within the meaning of the constitution, since we have repeatedly held that the uniformity there referred to is territorial only. (Loughborough vs. Blake, 5 Wheat., 317; Head Money cases, 112 U. S. 580). In the words of the constitution, the tax must be uniform "throughout the United States."

But this does not deprive the legislature of the power to make exemptions, provided such exemptions rest upon some principle, and are not purely arbitrary, or created solely for the purpose of favoring some person or body of persons. Thus in every civilized country there is an exemption of small incomes, which it would be manifest cruelty to tax, and the power to make such exemptions once granted, the amount is within the discretion of the legislature, and, so long as the power is not wantonly abused, the courts are bound to respect it.

In this law there is an exemption of $4,000, which indicates a purpose on the part of Congress that the burden of this tax should fall on the wealthy, or at least upon the well-to-do. If men who have an income or property beyond their pressing needs are not the ones to pay taxes, it is difficult to say who are; in other words, enlightened taxation is imposed upon property and not upon persons. The exemption of $4,000 is designed, undoubtedly, to cover the actual living expenses of the large majority of families, and the fact that it is not applied to corporations is explained by the fact that corporations have no corresponding expenses. The expenses of earning their profits are, of course, deducted in the same manner as the corresponding expenses of a private individual are deductible from the earnings of his business. The moment the profits of a corporation are paid over to the stockholders, the exemption of $4,000 attaches to them in the hands of each stockholder.

The fact that savings banks and mutual insurance companies, whose profits are paid to policy holders, are exempted, is explicable on the theory (whether a sound one or not I need not inquire) that these institutions are not, in their original conception, intended as schemes for the accumulation of money, and if this exemption operates as an abuse in certain cases, and with respect to certain very wealthy corporations, it is probable that the recognition of such abuses was necessary to the exemption of the whole class.

CHIEF JUSTICE FULLER'S OPINION AGAINST A FEDERAL INCOME TAX.

As heretofore stated, the constitution divided federal taxation into two great classes, the class of direct taxes and the class of duties, imposts and excises, and prescribed two rules which qualified the grant of power to each class. The power to lay direct taxes apportioned among the several states in proportion to their representation in the popular branch of congress, a representation based on population as ascertained by the census, was plenary and absolute, but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts and excises was subject to the qualification that the imposition must be uniform throughout the United States.

The words of the constitution are to be taken in their obvious sense and to have a reasonable construction. We know of no reason for holding otherwise than that the words "direct taxes" on the one hand and "duties, imposts and excises" on the other were used in the constitution in their natural and obvious sense; nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the constitution was framed and ratified.

The reasons for the clauses of the constitution in respect of direct taxation are not far to seek. The states, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities or otherwise. They gave up the great sources of revenue derived from commerce; they retained the concurrent power of levying excises, and duties if covering anything other than excises; but in respect of them the range of taxation was narrowed by the power granted over interstate commerce and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource, but even in respect of that they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore they did not grant the power of direct taxation without regard to their own condition and resources as states; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the states the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self government.

If, in the conditions of wealth and population in particular states, apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the states, however small, in the senate was stipulated for. The constitution ordains affirmatively that each state shall have two members of that body and negatively that no state shall, by amendment, be deprived of its equal suffrage in the senate without consent. The constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several states according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the states, their counties, cities and towns, would chiefly be met by direct taxation on accumulated property, while they expected those of the federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised except on necessity, and, when the necessity arose, should be so exercised as to leave the states at liberty to discharge their respective obligations, and should not be so exercised unfairly and discriminatingly as to particular states or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. Those who made it knew that the power to tax involved the power to destroy, and that, in the language of Chief Justice Marshall, "the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." (4 Wheat. 428). And they retained this security by providing that direct taxation and representation in the lower house of Congress should be adjusted on the same measure. . . .

The Chief Justice referred to the Hylton case and showed that Madison regarded the tax on carriages as a direct tax, which should have been apportioned, and that Fisher Ames considered it an excise and therefore constitutional, and he said that the evidence is overwhelming that Hamilton agreed with Ames.

All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the constitution. The constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the state are laid and assessed."

Being direct, and therefore to be laid by apportionment, is there any real difficulty in doing so? Cannot Congress, if the necessity exists of raising thirty, forty or any other number of million dollars for the support of the government in addition to the revenue from duties, imposts and excises, apportion the quota of each state upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real and personal property or the income of all persons in the state, and collect the same if the state does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way? Inconveniences might possibly attend the levy of an income tax, but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable.

CONCLUSION.

The foregoing extracts, it is believed, show with fairness and accuracy the positions of the several Justices. The dissenting opinions are largely based upon the question of policy and the majority opinions hew closely to the line of the constitution.

The question now is, shall the constitutional compromises between the States and the Nation, which were necessary to the formation of the "more perfect union," and under which the States still have the same rights and interests, be superseded and done away with by an amendment? This is a question of principle.

In addition there are two questions of policy, and those are whether, in view of the taxation of incomes by some of the states there shall be double taxation, and whether, in view of the equal representation of states in the senate, and the manifest desire in newer sections of the country to throw the chief burden of national taxation upon the older sections, it will be safe or just to authorize them to do it.

The pending amendment is not a question of reform in taxation; in legal effect it is a question of revolutionizing the Government.

END OF
TITLE